QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment prohibited the government from prosecuting respondent for manufacturing marijuana, where that prosecution was separate from, and subsequent to, the government's civil forfeiture of respondent's property, under 21 U.S.C. 881(a)(7), based on his use of the property to facilitate the manufacture of marijuana.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

GUY JEROME URSERY

UNITED STATES OF AMERICA, PETITIONER

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Ninth Circuits

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BRIEF FOR RESPONDENT GUY JEROME URSERY

OPINIONS BELOW

The opinion of the court of appeals in No. 95-345 (95-345 Pet. App. 1a-27a) is reported at 59 F.3d 568. The order of the district court rejecting respondent's double jeopardy claim (95-345 Pet. App. 38a-41a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1995. The petition for a writ of certiorari was filed on August 28, 1995, and was granted on January 12, 1996 (J.A. 81a-82a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The provisions of 21 U.S.C. 841 and 881 are reproduced in the appendix to the petition for certiorari.

STATEMENT

After executing a search warrant for respondent's premises, police officers found evidence that respondent was growing, processing, and consuming marijuana at or nearby his home in rural Michigan. For that offense, the United States first forfeited nearly half of respondent's equity in his home (under 21 U.S.C. 881(a)(7)) and later convicted and sentenced respondent to 63 months in prison. The court of appeals, faithfully applying this Court's decisions in *United States* v. *Halper*, 490 U.S. 435 (1989), and *Austin* v. *United States*, 113 S. Ct. 2801 (1993), held that the prosecution and sentence violated the "multiple punishments" component of the Double Jeopardy Clause. It therefore reversed respondent's conviction and vacated his sentence.

1. On July 30, 1992, some 15 officers of the Michigan State Police executed a search warrant at respondent's home in a rural part of Shiawassee County, Michigan. Pet. App. 2a; J.A. 36; Tr. 108.[1] In the course of the search, the officers seized 142 marijuana plants that were growing in six plots — three plots that were 25 feet outside respondent's property line, and three that were 150 feet outside the property line. Pet. App. 2a. The officers also seized from respondent's residence several plastic bags filled with marijuana seeds, some marijuana stems and stalks, a growlight, and two firearms. *Ibid.*

The United States thereafter commenced a civil forfeiture action, seeking to forfeit the residence and surrounding real property owned by respondent and his wife. In an affidavit submitted in support of a seizure warrant on September 30, 1992, Special Agent Christopher J. Hackbarth recited the same allegations contained in the earlier search warrant — that respondent had used the property to grow marijuana plants; that he had dried the plants on a woodpile in his backyard; and that he had stored the plants in a crawl space inside his house. J.A. 38, 76.

Based on those allegations, the affidavit asserted that respondent had used the property to facilitate the manufacture of marijuana, in violation of 21 U.S.C. 881(a)(7). J.A. 73-75, 80. Section 881(a)(7) generally authorizes the forfeiture of "[a]ll real property * * * which is used * * * to facilitate the commission of" any narcotics felony under Title 21. The affidavit recited that there was a mortgage on the property in the amount of $41,000 — which left respondent equity of about $29,000. J.A. 79; October 7, 1992 appraisal letter from Dean M. Helsom to the United States Marshals Service. The government served the seizure warrant for respondent's property on October 2, 1992. Pet. App. 3a.

The forfeiture action was thereafter brought before Judge Lawrence Zatkoff of the United States District Court for the

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[1] All references to "Pet. App." are to the Petition Appendix in No. 95-345.

Eastern District of Michigan and placed on the court's civil docket. Pet. App. 3a. Judge Zatkoff conducted a scheduling conference on November 9, 1992, and scheduled trial for July 1993. Pet. App. 3a. Over the course of the ensuing months, the parties conducted discovery and prepared for trial: respondent served interrogatories and document requests in December 1992 (J.A. 25); he litigated a motion to compel discovery in January 1993 (*ibid.*); and the parties exchanged witness lists for trial by February 4, 1993 (J.A. 26-27).

On May 17, 1993, respondent and his wife entered into a stipulation consenting to a judgment of forfeiture. Pet. App. 32a-34a. Under the stipulation, respondent and his wife agreed to pay the United States $13,250, and in return the government agreed to discharge the Lis Pendens it had filed against the property. Pet. App. 33a. The stipulation reiterated that the action had been commenced under 21 U.S.C. 881(a)(7), and provided that, for purposes of the settlement, respondent and his wife did "not contest that * * * the United States and or its agents had reasonable cause for the seizure of [the] property." Pet. App. 32a, 34a.

On May 24, 1993, Judge Zatkoff entered judgment pursuant to the stipulation. Pet. App. 35a-37a. The Urserys paid the judgment in full on June 17, 1993. Pet App. 3a.

2. On February 5, 1993 — with discovery completed and trial witness lists exchanged in the forfeiture action — a federal grand jury in the Eastern District of Michigan returned a one-count indictment against respondent. J.A. 28. The indictment charged that on or about July 30, 1992 — the date the search warrant was executed — respondent had manufactured marijuana, in violation of 21 U.S.C. 841(a)(1). J.A. 28. On reassignment from Judge Stewart A. Newblatt, the case was assigned to Judge Avern Cohn and set for trial on June 30, 1993. Pet. App. 3a.

Viewed in the best light for the government, the evidence at trial showed that over a two-year period respondent and his family had maintained six plots of marijuana plants about 25-150 feet beyond their property line. Pet. App. 2a. But as the trial court observed just before summations, "one of the interesting aspects of this case is the government has made no effort to suggest that [respondent] wasn't going to use this [marijuana] for his own purpose." Tr. 292. Indeed, the government never once argued that respondent's manufacturing of marijuana was for any purpose other than his family's consumption. As the prosecutor asserted in summation: "Why did the defendant grow the marijuana? Because he used this marijuana." Tr. 303.

Consistent with that theory, the government offered testimony showing that, at various times in 1991 and 1992, respondent kept marijuana plants both inside and outside his house. According to Heather McPherson — the informant for the search warrant and former fiancée of respondent's son Brian (Tr. 135, Pet. App. 2a) — respondent occasionally processed plants in his freezer and in his microwave oven (Tr. 145). Respondent also hung plants on hooks in a crawl space beneath the floor in the master bedroom closet. Tr. 147. To corroborate that testimony, the government offered the physical evidence seized from the residence on July 30, 1992 (Tr. 27), including marijuana seeds (Tr. 32), plastic baggies (Tr. 36), marijuana stalks and stems (Tr. 40, 42-44, 46), and a growlight (Tr. 45).

Following a three-day trial, respondent was convicted on the sole count of the indictment. Pet. 3a. Relying on *Austin* v. *United States* — which had been decided only two days before the trial began — respondent filed a post-trial motion to dismiss the criminal case on double jeopardy grounds. *Ibid.* In a terse order issued on September 13, 1993, the district court denied the motion. Pet. App. 38a-41a. The court stated that "[t]he forfeiture proceeding was settled by a consent judgment" and was therefore "not an adjudica-

tion." Pet. App. 39a. Moreover, the court held, "thee forfeiture proceeding and the criminal conviction were 'paart of a single, coordinated prosecution of [a] person involved in alleged criminal activity.'" *Ibid.* (citation omitted). Accordingly, Judge Cohn stated, "[w]hile the Court is surprised that the Government proceeded with its forfeiture action before obtaining an indictment, it nevertheless recognizes thatt such a single coordinated prosecution does not give rise to double jeopardy." Pet. App. 39a. On January 19, 1994, Judge Cohn sentenced respondent to a term of imprisonment for 63 months. Pet. App. 4a.

3. The court of appeals reversed by a divided vote.. Pet. App. 1a-27a. The court explained that "'[t]he Double Jeopardy Clause protects against three distinct abusees: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.'" *Id.* at 5a ((quoting *United States* v. *Halper*, 490 U.S. 435, 440 (1989)). "To decide whether the government has violated [respondent's] constitutional right," the court addressed "three key determinations: (1) whether the civil forfeiture in the instant case constitutes '*punishment*' for double jeopardy purposes; (2) whether the civil forfeiture and criminal conviction are punishment for *the same offense*; and (3) whether thee civil forfeiture and criminal prosecution are *separate proceedings*." Pet. App. 5a-6a (emphasis in the original).

The court first held that the forfeiture of respondent's property under 21 U.S.C. 881(a)(7) constituted "punishment." Pet. App. 9a-11a. The court of appeals observed that, under this Court's *Halper* decision, "'a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.'" *Id.* at 10a (quoting *Halper*, 490 U.S. at 448) (emphasis deleted). Moreover, thee court noted that under *Austin* v. *United States*, 113 S. Ct. 2801

(1993), civil forfeitures pursuant to 21 U.S.C. 881(a)(7) are punishment, for purposes of the Excessive Fines Clause of the Eighth Amendment, because they do not "serve solely a remedial purpose." Pet. App. 10a. The court of appeals accordingly concluded that "any civil forfeiture under 21 U.S.C. § 881(a)(7) constitutes punishment for double jeopardy purposes." Pet. App. 11a.

Applying the rule in *Blockburger* v. *United States*, 284 U.S. 299 (1932), the court next held that respondent had been twice punished for "the same offense." Pet. App. 11a-13a. The court explained (*id.* at 12a) that, under Section 881(a)(7), the government may forfeit any property used to commit "'a violation of this subchapter.'" Because "the government cannot confiscate [respondent's] residence without a showing that he was manufacturing marijuana," it follows that "[t]he criminal offense is in essence subsumed by the forfeiture statute and thus does not require an element of proof that is not required by the forfeiture action." *Ibid.* Accordingly, the court held, "the forfeiture and conviction are punishment for the same offense because the forfeiture necessarily requires proof of the criminal offense." *Ibid.*

Finally, the court held that respondent had been punished in "separate proceedings." Pet. App. 13a-18a. The court found that "the facts in this case fail to reveal * * * a single, coordinated proceeding." *Id.* at 16a. In particular, the court noted (*ibid.*):

> [T]he record reveals no indication that the government intended to pursue the civil forfeiture action and the criminal prosecution as a coordinated proceeding. Moreover, as government counsel made clear at oral argument, there has been no communication between the government attorneys who handled [respondent's] criminal prosecution and those who handled the civil forfeiture action. The civil forfeiture proceeding and the criminal proceeding were instituted four months

apart, presided over by different judges, and resolved by separate judgments.

Judge Milburn dissented. Pet. App. 19a-27a. In his view, the forfeiture and prosecution in this case were part of a single, coordinated proceeding because there was no "potential for government abuse of process; the government instituted and pursued both proceedings against defendant before it knew the outcome of either case." *Id.* at 20a, 22a-23a. Judge Milburn also concluded that respondent had not been punished for the same offense: whereas the forfeiture action was based on the use of respondent's property in manufacturing marijuana "over the course of several years," the "indictment charged defendant only with the manufacture of a controlled substance during 1992." *Id.* at 27a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over some period of time culminating on July 30, 1992, Guy Jerome Ursery grew marijuana plants on six plots, harvested the crop, and manufactured marijuana for his family's personal use. That was assuredly an offense, for which respondent was subject to punishment. And punished he was — not once, but twice: first, when nearly half respondent's equity in his house and land was forfeited; and second, when he was criminally prosecuted, convicted, and sentenced to more than five years in prison. In each case, the "offense" was the same: respondent's manufacture of marijuana. And the two punishments were imposed in separate proceedings: one civil, the other criminal; each before a different judge; and the second instituted more than four months after the first, as the parties were readying themselves for trial on the government's forfeiture claim.

"This Court many times has held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States*

v. *Halper*, 490 U.S. 435, 440 (1989). Accord *Ohio* v. *Johnson*, 467 U.S. 493, 498-499 (1984); *Illinois* v. *Vitale*, 447 U.S. 410, 415 (1980); *Abney* v. *United States*, 431 U.S. 651, 660-661 (1977); *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). Moreover, with respect to the "multiple punishments" component, "the language of the Double Jeopardy Clause protects against more than the actual imposition of two punishments for the same offense; by its terms, it protects a criminal defendant from being *twice put in jeopardy* for such punishment." *Witte* v. *United States*, 115 S. Ct. 2199, 2204 (1995) (emphasis in the original). Thus, the Double Jeopardy Clause prohibits, not only punishing twice, but even "*attempting a second time to punish criminally*, for the same offense.'" *Ibid.* (emphasis in the original). Applying these principles, the court below correctly held (Pet. App. 1a-27a) that, by prosecuting respondent after first forfeiting his property, the government had violated respondent's double jeopardy protection against multiple punishments.

The Solicitor General does not dispute that the Double Jeopardy Clause protects persons against multiple punishments. Nevertheless, for four different reasons, the government maintains that prosecuting, convicting, and sentencing Mr. Ursery did not violate that protection. First, it contends (Br. 36-47) that forfeiting respondent's property did not "punish" him within the meaning of the Double Jeopardy Clause. Second and relatedly, it asserts (Br. 26-36) that, even if Mr. Ursery *was* punished by the forfeiture, double jeopardy protections do not apply because the forfeiture was imposed *before*, rather than *after*, the criminal prosecution. Third, the government argues (Br. 50-53) that, even if respondent was punished twice, the punishments were not for "the same offense." Finally, the government insists (Br. 54-59) that the two punishments were imposed in the "same proceeding."

As we show below, each of those arguments is mistaken.

A. This Court held in *Halper* that a civil sanction imposes "punishment" for purposes of the Double Jeopardy Clause if the sanction "cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes" (490 U.S. at 448 (emphasis added)). Applying that principle, the Court held in *Austin* that forfeitures of property used to facilitate narcotics felonies under 21 U.S.C. 881(a)(7) constitute punishment, at least in part. It follows that respondent Ursery was "punished" — at least to some extent — when nearly half the equity in his real property was forfeited under Section 881(a)(7) for the offense of manufacturing marijuana. Although the government attempts to distinguish the two cases — and, failing that, to confine them to their facts — *Halper* and *Austin* dispositively settle the first issue: Mr. Ursery was punished when his property was forfeited.

B. It does not matter for double jeopardy purposes that the civil case came first and the criminal case came second, rather than vice versa. If, as *Halper* held, the threat of a civil sanction can (in some cases) violate the Double Jeopardy Clause, that can only be because the action seeking the civil sanction places the defendant in "jeopardy." And whether that civil "jeopardy" comes first or second cannot possibly make a difference. The government's contrary view has been rejected by every court to have considered it and cannot withstand analysis.

C. Both the forfeiture of respondent's property and his criminal prosecution were for "the same offense" — manufacturing marijuana. By its terms, Section 881(a)(7) authorizes forfeiture of any property used to commit (or facilitate the commission of) any narcotics felony, including manufacturing marijuana. Forfeiture is thus the punishment for a "greater offense" (using property to commit a narcotics felony), and the manufacturing felony is "a species of lesser-

included offense" (*Illinois* v. *Vitale*, 447 U.S. 410, 420 (1980)) within the forfeiture. As such, the incorporated narcotics felony cannot be separately prosecuted (under *Blockburger*) once the defendant has already been punished for the greater "offense." Nor does it matter, in that regard, that the greater offense (here, using property to commit a narcotics felony) *could* have been based on a *different* predicate (say, money laundering). Under this Court's cases, the lesser-included offense analysis must focus on the government's actual prosecution of the defendant — not some theoretical prosecution the government might someday pursue. Here, the forfeiture was explicitly based on the very same crime for which Mr. Ursery was subsequently prosecuted.

D. The prosecution and the forfeiture action were "separate proceedings." The two actions had all the conventional earmarks of separate proceedings: different judges, different dockets, different schedules, different natures (one civil, one criminal), and different beginning and ending dates. Moreover, the government capitalized on these differences to extract important strategic advantages: it pursued the forfeiture case just long enough to obtain respondent's trial witness list — which it could never have gotten in federal criminal discovery — before commencing the criminal case. In addition, unlike the cases on which the government relies, the separation of the two proceedings in this case was instigated by the government, not by respondent. By subjecting Mr. Ursery to two partly successive, partly contemporaneous — but in all events *separate* — penal proceedings, the government engaged in precisely the kind of oppression and harassment that the Double Jeopardy Clause is designed to prevent.

ARGUMENT

RESPONDENT'S CRIMINAL PROSECUTION FOR MANUFACTURING MARIJUANA WAS BARRED BY THE DOUBLE JEOPARDY CLAUSE

A. The Civil Forfeiture Of Respondent's Property Under 21 U.S.C. 881(a)(7) Constituted "Punishment" For Purposes Of The Double Jeopardy Clause

Respondent forfeited to the United States nearly half the equity in his home and real property (J.A. 79). As framed by the forfeiture complaint and stipulation for entry of judgment (Pet. App. 28a-31a, 32a-34a) — and accordingly as found by Judge Zatkoff in entering a judgment on consent (*id.* at 35a-37a) — the property was forfeited under 21 U.S.C. 881(a)(7) because it was used by respondent "to facilitate the unlawful processing" of marijuana. Respondent and his wife duly paid the forfeiture about three weeks after judgment was entered. Pet. App. 3a.

This Court's decisions in *United States* v. *Halper*, 490 U.S. 435 (1989), and *Austin* v. *United States*, 113 S. Ct. 2801 (1993), leave no doubt that the forfeiture of respondent's property constituted "punishment" for purposes of the Double Jeopardy Clause. Although the government struggles mightily to find some daylight between this case and *Halper* and *Austin*, the distinctions it draws are completely artificial. In the end, although the government is too reticent to say so, it really just wants those cases overruled. But the government has failed to offer any reason to overrule *Halper* and *Austin*, much less the "compelling justification" required by this Court. See *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991); *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989).

1. The defendant in *Halper* was the target of a civil False Claims Act (31 U.S.C. 3729-3731) lawsuit following his

prosecution, conviction, and sentencing on 65 counts arising from false reimbursement claims he had submitted to the United States. Although the false claims had caused a loss to the United States of only $585, in the subsequent civil action Halper was subject to a statutory penalty of more than $130,000. The question presented in *Halper* was "whether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." 490 U.S. at 443. The Court unanimously held that it could.

The Court began by rejecting the government's contention that a sanction could be punitive only if Congress expressly said it was. 490 U.S. at 447. The Court explained that "while recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments." *Ibid.* "This constitutional protection," the Court emphasized, "is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." *Ibid.*

A civil sanction constitutes punishment, the Court stated, "when the sanction as applied in the individual case serves the goals of punishment." 490 U.S. at 448. In particular, the Court held (*ibid.* (emphasis added)):

> a civil sanction that cannot fairly be said *solely to serve a remedial purpose*, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

In view of the "disproportionate" relationship between Halper's potential civil penalty and the apparent costs to the government arising from Halper's conduct, the Court

concluded (*id.* at 452) that the civil sanction might well constitute punishment. It remanded the case to afford the government an opportunity to show that its actual costs were higher than the district court had surmised. *Ibid.*

The government reads *Halper* very differently (Br. 37-39). Taking one of the statements in the case wholly out of context, the government asserts (Br. 37) that under *Halper* a civil sanction is punitive when it can be characterized "'*only* as a deterrent or retribution.'"[2] Accordingly, the government asserts (*ibid.*), "a dominant remedial purpose renders a sanction nonpunitive for purposes of the Double Jeopardy Clause, even if the sanction could also be said, in some respects, to act as a deterrent."

That is not at all what *Halper* says. Indeed, although it relegates the relevant text to a footnote (Br. 38 n.6), the government acknowledges (Br. 38) that there is at least "[s]ome language in *Halper*" that makes clear that a civil sanction is necessarily punitive (at least in part) when it cannot be *fully* accounted for in non-punitive terms. That "language" is in fact the very holding of the case, and the Court could hardly have made the point more plainly: "[A] civil sanction that cannot fairly be said *solely to serve a remedial purpose*, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." 490 U.S. at 448 (emphasis added).

There is simply no trace of the government's "dominant purpose" test in the actual decision in *Halper*. To the contrary, the Court fully recognized in *Halper* that the "dominant purpose" of a civil exaction may well be remedial

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[2] The Court in *Halper* stated that a sanction is punitive when it "may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 U.S. at 449. But the word "only" in that sentence obviously meant "rather," not "exclusively," as the government seems to believe.

and yet the *balance* of the exaction remain punitive. For example, the Court found it "hardly * * * necessary to state that a suit under the Act alleging one or two false claims" would be permissible; "[i]t is only when a sizable number of false claims is present that, as a practical matter, the issue of double jeopardy may arise." 490 U.S. at 451 n.12. Put another way, at some point the size, scope, or nature of a civil penalty may become so large — so out of proportion to the societal costs imposed by the underlying conduct — that the sanction can no longer be *fully* explained by its remedial purposes. At that point, the sanction can be understood "only as a deterrent or retribution" — that is, only as *punishment*, at least in part.[3]

2. In *Austin*, 113 S. Ct. 2801, the Court dispelled any doubt about the appropriate framework for determining when a civil sanction constitutes "punishment." The question in *Austin* was whether the forfeiture of property under 21 U.S.C. 881(a)(4) and (a)(7) — the latter of which is the very provision under which Mr. Ursery's property was forfeited — is "punishment" under the Excessive Fines Clause of the

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[3] Not long ago, the government itself read *Halper* in just that way. In its amicus brief in *Department of Revenue of Montana* v. *Kurth Ranch*, No. 93-144, the government explained that "[t]he principle guiding" *Halper* was that,

> if the measure being challenged as imposing a punishment may serve both penal and non-penal purposes, but the non-penal purposes are insufficient to explain its enactment or application, then the measure must be regarded as punishment. In other words, when analyzing a civil measure that has dual penal and non-penal purposes, the analysis turns on whether the non-penal * * * purposes are insufficient to explain the measure, either in general or in a particular case. If the non-penal purposes are sufficient, the fact that the measure may serve penal purposes as well is essentially irrelevant.

Brief For The United States As Amicus Curiae Supporting Petitioner at 14-15 (footnote omitted).

Eighth Amendment. The Court acknowledged that forfeiture might serve *both* remedial and punitive purposes; but, as the Court noted, "[w]e need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause." 113 S. Ct. at 2806. So long as a civil sanction "can only be explained as serving in part to punish," it must be regarded, *at least to that extent*, as punishment. The Court reiterated the rule it had articulated in *Halper* (490 U.S. at 448): "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving retributive or deterrent purposes, is punishment, as we have come to understand the term." 113 S. Ct. at 2806.

Applying those principles, the Court held that forfeitures effected under 21 U.S.C. 881(a)(4) and (a)(7) do indeed constitute punishment for purposes of the Excessive Fines Clause. The Court observed that "forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment." 113 S. Ct. at 2810. And the Court discerned "nothing in [21 U.S.C. 881(a)(4) and (a)(7)] or their legislative history to contradict the historical understanding of forfeiture as punishment." *Ibid.* To the contrary, the Court noted that "[u]nlike traditional forfeiture statutes, §§ 881(a)(4) and (a)(7) expressly provide an 'innocent owner' defense"; "[t]hese exemptions," the Court added, "serve to focus the provisions on the culpability of the owner in a way that makes them look more like punishment, not less." 113 S. Ct. at 2810-2811.[4] In addition, the Court stated, "Congress has chosen to tie forfeiture directly to the commission of drug offenses." *Id.* at 2811. Finally, the Court pointed out that "[t]he legislative

[4] Section 881(a)(7) exempts property from forfeiture "to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

history of § 881 confirms the punitive nature of these provisions." *Ibid.* "In light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish," the Court in *Austin* could not "conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose." 113 S. Ct. at 2812. The Court therefore held that a forfeiture under those statutes constitutes "punishment," subject to the limitations of the Excessive Fines Clause. *Ibid.*

Equally important, the Court held, categorically, that forfeitures under Sections 881(a)(4) and (a)(7) *invariably* constitute "punishment." 113 S. Ct. at 2812 n.14. Unlike the civil sanctions in *Halper* — which "'in the ordinary case . . . can be said to do no more than make the Government whole'" — "[t]he value of the conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7) * * * can vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental." 113 S. Ct. at 2812 n.14. Moreover, the Court reiterated that "forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence." *Ibid.*[5]

3. It follows ineluctably from *Halper* and *Austin* that respondent was "punished" when his property was forfeited under 21 U.S.C. 881(a)(7). Cf. *Libretti* v. *United States*, 116 S. Ct. 356, 363 (1995) (under *Austin*, "civil forfeiture

[5] This Court's recent decision in *Bennis* v. *Michigan*, No. 94-8729 (Mar. 4, 1996), does not alter the analysis. True, the Court stated in *Bennis* (slip op. 10) that forfeiture "serves a deterrent purpose distinct from any punitive purpose." But the Court did not retreat in any way from its holdings in *Halper* and *Austin* that where a non-punitive goal (including deterrence) cannot *fully* account for the size and nature of a civil sanction, that sanction is necessarily punitive, at least in part.

authorized by 21 U.S.C. §§ 881(a)(4) and (a)(7) is punitive in nature"). *Halper* articulated the framework for deciding when a civil sanction is "punishment" for double jeopardy purposes; *Austin* applied that framework to forfeitures under Section 881(a)(7) and found them invariably to be punitive, at least in part, under the Eighth Amendment; Section 881(a)(7) forfeitures must therefore be "punishment" for double jeopardy purposes as well. Accord *United States* v. *9844 South Titan Court, Unit 9, Littleton, Colorado*, 75 F.3d 1470, 1484 (10th Cir. 1996) (under *Halper* and *Austin*, "forfeiture constitutes punishment for double jeopardy purposes").

The government evidently recognizes as much, as it devotes most of its argument (Br. 38-43) to a thinly veiled suggestion that *Halper* and *Austin* be overruled. Thus, it asserts (Br. 38) that portions of *Halper* — including, as it happens, the unanimous holding of the case — "sweep too broadly" and articulate "a conception of punishment [that] is not supported by the precedent on which *Halper* relied." But the government offers no "compelling justification" (*Hilton* v. *South Carolina Public Railways Comm'n*, 502 U.S. at 202) for revisiting a *unanimous* decision that was rendered only seven years ago and that was reaffirmed and reapplied in *Austin* only three years ago — in an opinion whose relevant portion was not disputed by any Member of the Court. See 113 S. Ct. at 2806; *id.* at 2813-2814 & n.* (Scalia, J., concurring in part and concurring in the judgment); *id.* at 2815-2816 (Kennedy, J., concurring in part and concurring in the judgment). And *stare decisis*, it need hardly be added, is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991); see also *Welch* v. *Texas Department of Highways &*

Public Transportation, 483 U.S. 468, 494 (1987); *Vasquez* v. *Hillery*, 474 U.S. 254, 265-266 (1986).

True, "the use of the Double Jeopardy Clause to protect against multiple punishments has been questioned." Gov't Br. 31. See *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937, 1955-1960 (1994) (Scalia, J., joined by Thomas, J., dissenting); *Witte* v. *United States*, 115 S. Ct. 2199, 2209-2210 (1995) (Scalia, J., joined by Thomas, J., concurring in the judgment). But as the government cannot dispute, this Court has consistently recognized a multiple-punishments component in the Double Jeopardy Clause, most recently just nine months ago in *Witte*. Indeed, it is arguable that the protection against multiple punishments for a single offense was the *primary* historical purpose underlying the Clause. As the Court observed in *Halper* (490 U.S. at 440), the first forerunner of the Clause to appear in the American colonies was paragraph 42 of the Massachusetts "Body of Liberties," adopted by the General Court in 1641: "No man shall be twice *sentenced* by Civil Justice for one and the same Crime, offense, or Trespasse." American Historical Documents 1000-1904, 43 Harvard Classics 66, 72 (C. Eliot ed. 1910) (emphasis added). Similarly, James Madison's first draft of what became the Double Jeopardy Clause specified that "[n]o person shall be subject, except in cases of impeachment, to *more than one punishment* or one trial for the same offense." 1 Annals of Cong. 451-452 (1789-1791) (J. Gales ed. 1834) (emphasis added). The change to the more arcane language of the Clause as adopted was not intended to alter Madison's meaning. See J. Sigler, *Double Jeopardy* 28-33 (1969); Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 266 n.13 (1965);

Thomas, *A Unified Theory of Multiple Punishment*, 47 U. Pitt. L. Rev. 1, 3 & n.3 (1985).[6]

Finally, the government misapprehends (not simply misstates) the holding in *Halper*. *Halper* did *not* hold, as the government intimates (Br. 38), that "a civil sanction with *any* deterrent purpose should be viewed as 'punishment.'" If that were the holding in *Halper*, the extended inquiry in *Austin* would hardly have been necessary, since, as the government notes (Br. 39), "[t]here are few, if any, civil sanctions that do not serve *in part* to deter." Rather, the rule in *Halper* is that, if a civil sanction has *both* punitive and non-punitive purposes, but the non-punitive purposes cannot "'solely" justify the nature and scope of the exaction, it follows that the sanction must be punitive, at least in part. The government fails to show how "that formulation would sweep too broadly." Br. 38.

The government also takes aim (Br. 39-43) at *Austin*, suggesting alternative ways in which the case could have been decided (Br. 40), but of course was not. It also characterizes the case (Br. 42) as outside "[t]he mainstream of this Court's cases" — a proposition that is difficult to square with the absence of dissent from the relevant portion of the opinion. Nor has the government shown that *Austin* was a departure from past precedents,[7] or that experience

[6] See *United States* v. *Fogel*, 829 F.2d 77, 88 (D.C. Cir. 1987) (Bork, J.) (the Double Jeopardy Clause "applies to 'multiple punishments' because, if it did not apply to punishment, then the prohibition against 'multiple trials' would be meaningless; a court could achieve the same result as a second trial by simply resentencing a defendant after he has served all or part of an initial sentence").

[7] Compare *Collins* v. *Youngblood*, 497 U.S. 37, 48-49 (1990); *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 273 (1980) (plurality opinion); *Monell* v. *Department of Social Services*, 436 U.S. 658, 695-696 (1978); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 47 (1977); *United States* v. *Darby*, 312 U.S. 100, 116-117 (1941).

has proved *Austin* to be unworkable, to sow confusion, or to produce unforeseen or anomalous results.[8]

The government also argues at length (Br. 41-43) that *Austin* should not be "exten[ded] * * * to the double jeopardy setting." But there is nothing to "extend" in this case. *Austin* applied to Eighth Amendment cases the framework devised in *Halper* explicitly *for double jeopardy cases*. In any event, it is difficult to see why "punishment" for Eighth Amendment purposes should be different from "punishment" under the Double Jeopardy Clause. After all, "[t]he first ten amendments and the original Constitution were substantially contemporaneous and should be construed *in pari materia*." *Patton* v. *United States*, 281 U.S. 276, 298 (1930). And consistent with that principle, the Court has traditionally given the same construction to terms that appear in different places in the Constitution. See, *e.g.*, *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (construing reference to "the people" in the Fourth Amendment consistently with the First, Second, Ninth, and Tenth Amendments and the Preamble); *Patton* v. *United States*, 281 U.S. at 298 (right to jury trial contained in Sixth Amendment construed consistently with right to jury trial under Article III, Section 2); *Hepburn & Dundas* v. *Ellzey*, 6 U.S. (2 Cranch) 445, 453 (1805) (Marshall, C.J.) ("When the same term ["state"] which has been used plainly in this limited sense, in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it"). The government offers no reason to abandon that interpretive practice in this case. Nor does the government explain why a forfeiture may be sufficiently punitive to

[8] Compare *Payne* v. *Tennessee*, 501 U.S. at 827; *California* v. *Acevedo*, 500 U.S. 565, 576 (1991); *Collins* v. *Youngblood*, 497 U.S. at 50; *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. at 47.

constitute an excessive fine and yet not punitive enough to trigger double jeopardy protections.[9]

Finally, the government frets (Br. 41) that "[t]he extension of *Austin*'s reasoning * * * to the double jeopardy setting would have significant practical consequences." In particular, it says (*ibid.* (emphasis in the original)), *Austin* might "completely bar a later criminal prosecution of the property owner, even if the *particular* prior civil forfeiture were fairly characterized as substantively remedial." Moreover, the government warns (*ibid.*), "if *Austin*'s formulation were extended to other contexts, it could cast unwarranted doubt on the constitutionality of practices that have long been thought entirely proper, * * * would lead to increased litigation about matters unrelated to the basic concerns of the relevant constitutional provision, and likely would ultimately prove unworkable."

This parade of horribles is actually a parade of red herrings. In the first place, the government has the option of bringing both the forfeiture and the prosecution in the same proceeding. Under 21 U.S.C. 853(a)(2), any person convicted of a narcotics felony under Title 21 is *required* to forfeit any "property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" that felony. The government routinely includes such forfeiture counts in its criminal indictments. See, *e.g.*, *United States* v. *Bieri*, 21 F.3d 819, 821 (8th Cir. 1994), cert. denied, 115 S. Ct. 208 (1994); *United States* v. *Ben-Hur*, 20 F.3d 313, 316 (7th Cir. 1994); *United States* v. *Roth*, 912 F.2d 1131,

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[9] The government notes (Br. 41 n.10) that "this Court's characterization of forfeiture as either punitive or remedial has depended upon the specific legal context in which that question arose." But the cases cited by the government stand only for the undeniable proposition that some forfeitures are punitive, while others are not. None of the cases stands for the quite different proposition that a particular type of forfeiture may be punitive for purposes of one constitutional provision but not another.

1132 (9th Cir. 1990). And as the government itself points out (Br. 54), there is no double jeopardy bar to multiple punishments that are sought in a single proceeding. See, *e.g.*, *Missouri* v. *Hunter*, 459 U.S. 359, 368-369 (1983).[10]

Moreover, the government's fear (Br. 41) that *Austin* might be generalized to "all civil forfeitures," or even "other contexts," is overwrought. *Austin* took pains to rely (113 S. Ct. at 2810-2812) on the specially punitive features of Section 881(a)(7). Those features include, most pertinently, the fact that Section 881(a)(7) forfeitures bear "'absolutely no correlation to any damages sustained by society or to the cost of enforcing the law'" (*id.* at 2812). Forfeiture statutes correlating more closely with public harm are easily distinguishable on that ground. And sanctions like the "suspension of [a] motorist's license" (Gov't Br. 41) bear no relationship to Section 881(a)(7) at all. In fact, although amici State of Connecticut et al. complain about double jeopardy claims arising from suspended licenses (Br. 11), amici Advocates for Highway and Auto Safety et al. report (Br. 12-13) that such claims have been "unanimously rejected" by every one of the 14 state courts of last resort to have considered the issue — precisely because, sensibly enough, such proceedings do not contain the punitive features of Section 881(a)(7).

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[10] The government protests (Br. 56 n.17) that "the vast majority of civil forfeiture statutes have no criminal forfeiture analogue." But the government does not explain why any of those statutes would be regarded as sufficiently "punitive" to raise double jeopardy concerns. Nor is it apparent why civil forfeitures lacking a "criminal forfeiture analogue" could not be joined in a single proceeding with a criminal case. Although the government asserts that this "cannot" be done "under our system of justice" (Br. 55), it does not explain why that is so. In fact, we know of no law that prohibits the government from initiating a single, continuous proceeding in which, for example, a jury first considers the criminal charges and the trial court immediately thereafter entertains a civil forfeiture proceeding.

4. In sum, the holding in *Austin* — that forfeitures of instrumentalities under 21 U.S.C. 881(a)(7) *invariably* constitute punishment, at least in part — clearly extends to the double jeopardy context. But even if the Court were prepared to jettison (or severely cabin) the rule in *Austin*, and instead apply what the government terms "the appropriate case-by-case inquiry" purportedly mandated by *Halper*, the result would be the same: the forfeiture of respondent's property was "punishment" for purposes of double jeopardy protections.

Under *Halper*, when a civil sanction "appears to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment." 490 U.S. at 449-450. As Justice O'Connor explained in her dissenting opinion in *Kurth Ranch*, 114 S. Ct. at 1954, "the defendant must first show the absence of a rational relationship between the amount of the sanction and the government's nonpunitive objectives; the burden then shifts to the government to justify the sanction with reference to the particular case." If that framework is applied to the present case, it would fall first to respondent to show that the forfeiture of his property under Section 881(a)(7) "appears to qualify as 'punishment'" (490 U.S. at 449), and thereafter to the government "to justify the sanction with reference to the particular case" (114 S. Ct. at 1954).

If *Austin* is no longer to mean that Section 881(a)(7) forfeitures are *always* punitive (at least in part), surely *Austin* (unless overruled entirely) would require a *presumption* that Section 881(a)(7) forfeitures are partly punitive. Such a presumption makes perfect sense: Section 881(a)(7) — a statute of "immense scope" (*United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 515 (1993) (Thomas, J., concurring in part and dissenting in part)) — authorizes the forfeiture of "[a]ll real property, including any right,

title, and interest * * * which is used * * * in any manner or part" to facilitate a narcotics felony. Under that statute "all" property may be forfeited, even if only a "part" was used to facilitate the offense. The value of the forfeited property is likewise irrelevant: "*[A]ny* property, whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction." *Id.* at 515 n.1. "Scales used to measure out unlawful drug sales, for example, are confiscable whether made of the purest gold or the basest metal" (*Austin*, 113 S. Ct. at 2815 (Scalia, J., concurring in part and concurring in the judgment)).[11] And actual facilitation is not even required; merely an "intent" to facilitate is enough to forfeit property that was never actually deployed in the commission of a crime.

What is more, the statute makes no attempt to calibrate the extent of the forfeiture to the actual costs imposed by the offense. To the contrary, as the *Austin* Court explained, "the dramatic variations in the value of conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7) undercut" any contention that the forfeited assets merely "serve to compensate the Government for the expense of law enforcement activity and for its expenditure on societal problems such as urban blight, drug addiction, and other health concerns resulting from the drug trade." 113 S. Ct. at 2811. Section 881(a)(7) simply makes no "consideration of compensating for loss, since the value of the property is irrelevant to whether it is forfeited." *Id.* at 2814 (Scalia, J., concurring in part and concurring in the judgment).

It follows that a forfeiture under Section 881(a)(7) certainly "*appears* to qualify as 'punishment' in the plain

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[11] Or, to take a more notorious example, "'[i]f Hugh Grant had been driving a Lamborghini would he have had to forfeit a $140,000 car? * * * That would seem pretty arbitrary.'" *Give and Take on the Hot Issue of Asset Forfeiture*, Wash, Post, March 11, 1996, Wash. Bus., at 7.

meaning of the word." *Halper*, 490 U.S. at 449 (emphasis added). Accordingly, "the burden [now] shifts to the government to justify the sanction with reference to the particular case." *Kurth Ranch*, 114 S. Ct. at 1954 (O'Connor, J., dissenting). But the government has not undertaken, much less carried, that burden here. It offered no evidence in the lower courts to establish the costs associated with respondent's offense.[12] And its effort to do so in this Court, after the fact, is unavailing.

The government contends (Br. 46), for example, that "[b]ecause respondent used the property for several years to process and distribute a controlled substance, it significantly furthered the harms occasioned by drug trafficking." But the government greatly overstates the case. First and foremost, respondent "used" very little of "the property" to manufacture marijuana. As the evidence ultimately revealed (Pet. App. 2a) — and as the government now concedes (Br. 3) — *all of the marijuana plants were grown completely outside the confines of respondent's property*. And respondent used very little of his house to process the plants, performing most of the work in a crawl space beneath the floor in the master bedroom closet. Tr. 147. Yet the government secured a

[12] In the district court, the government argued that respondent had waived his double jeopardy rights, that a double jeopardy claim could not be predicated on a consent judgment, that *Austin* should not be extended beyond the Eighth Amendment setting, and that the forfeiture and prosecution in this case were actually part of a single proceeding. See *Government's Response To Defendant's Motion For Dismissal* (filed Aug. 25, 1993). It did not argue, much less prove, that its costs of prosecution were commensurate with the amount of the forfeiture. And although the government *asserted* in the court of appeals that the size of the forfeiture was proportionate to the government's costs, it did not — because, on the record, it could not — quantify those costs with even a "rough justice * * * approximation" (*Halper*, 490 U.S. at 449-450).

forfeiture worth nearly half the equity in respondent's 10-acre property. Tr. 246.[13]

Moreover, the government's reference to "distribution" is unwarranted on this record. The forfeiture proceeding was resolved on consent, and thus the only evidence in the record of respondent's "drug trafficking" activity consists of the affidavit submitted in support of the seizure warrant. See J.A. 73-80. The affidavit recited that respondent had grown six plots of marijuana plants, had harvested them, and — in view of the evidence seized from within his residence — had evidently processed them. J.A. 76-79. But there was not even an *allegation* of distribution, much less evidence to support it. To the contrary, the affidavit suggested nothing more than what the criminal trial ultimately proved: that respondent was growing some marijuana plants for his family's own consumption. See, *e.g.*, J.A. 79 ("a partially burnt hand rolled cigarette" was seized by the police from "the upper left desk drawer in bedroom No. 1" and it later proved to be marijuana).[14]

It therefore cannot be said on this record that respondent's manufacture of marijuana entailed the kinds of costs typically associated with "several years" of "distribut[ing] a controlled

[13] Thus, the government's analogy to a case in which "an entire apartment building was used to sell crack cocaine" (Br. 44 n.12) is inapt. Indeed, it is hard to square any such suggestion with the government's decision in this case to permit Mr. Ursery to *keep* his house and forfeit money instead.

[14] Significantly, the undisputed evidence at trial confirmed that respondent's manufacture of marijuana was for personal use. Commenting on the evidence at the close of the case, the trial court remarked: "[O]ne of the interesting aspects of this case is the government has made no effort to suggest that [respondent] wasn't going to use this [marijuana] for his own purpose." Tr. 292. And the government itself made much the same point in summation: "Why did the defendant grow the marijuana? Because he used this marijuana." Tr. 303.

substance." Gov't Br. 46. Perhaps recognizing as much, the government places a thumb on the scale, allocating (Br. 45) to respondent the duty to "defray[] the government's costs of enforcement and the societal harms created by that activity." But it hardly accords even with "rough remedial justice" (*Halper*, 490 U.S. at 446) to "plac[e] full responsibility for the 'war on drugs' on the shoulders of every individual claimant" (*United States* v. *Certain Real Property & Premises Known as 38 Whalers Cove Drive*, 954 F.2d 29, 37 (2d Cir.), cert. denied, 506 U.S. 815 (1992)). The question is one of degree, and the government has not shown (nor could it) that the amount of the forfeiture in this case was tailored to remediation only. In short, even accounting for "[a] reasonable allocation of more generalized enforcement costs — in the nature of overhead" (*ibid.*), the government has failed to overcome the presumption that the Section 881(a)(7) forfeiture in this case was, at least partly, punitive.

5. The court of appeals' decision rests exclusively on the multiple *punishments* component of the Double Jeopardy Clause. See Pet. App. 5a. But the forfeiture and prosecution in this case also violated the double jeopardy protection against multiple *prosecutions*. As the government acknowledges (Br. 20), "a pervasively penal civil statute" may trigger the protection against multiple prosecutions. This Court's decision in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), frames the appropriate analysis. In that case, the Court invalidated a statute that prescribed, without a criminal trial, loss of citizenship for any person who, to evade military service, remained outside the United States in time of war. The Court concluded (*id.* at 164) that the statute was "essentially penal in character." In reaching that result, the Court looked to several factors (*id.* at 168-169 (footnotes omitted)):

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry.

Significantly, although it did not formulate its analysis in precisely those terms, the Court in *Austin* applied the very same criteria when it concluded that a forfeiture under 21 U.S.C. 881(a)(7) is, indeed, "punishment." Thus, the Court explained in *Austin* (113 S. Ct. at 2810-2812) (i) that under Section 881(a)(7) otherwise lawful property is forfeited ("an affirmative disability or restraint" (372 U.S. at 168)); (ii) that forfeitures have "historically been regarded as a punishment" (*ibid.*); (iii) that Section 881(a)(7) contains an "innocent owner" exception (and thus "comes into play only on a finding of" a form of "*scienter*") (372 U.S. at 168); (iv) that Section 881(a)(7) forfeitures "promote the traditional aims of punishment — retribution and deterrence" (372 U.S. at 168); (v) that a Section 881(a)(7) forfeiture is "tie[d] directly to the commission of drug offenses" (and thus "the behavior to which it applies is already a crime" (372 U.S. at 168)); and (vi) that imposing a forfeiture under Section 881(a)(7) "'ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law'" (and thus, again in the words of *Mendoza-Martinez*, the sanction "appears excessive in relation to the alternative purpose assigned" (372 U.S. at 169)).

It bears mention, finally, that none of the forfeiture cases on which the government relies (Br. 21-24) requires a different conclusion, or even provides a heavy counterweight — since none of the forfeiture statutes in those cases was remotely like Section 881(a)(7). It is one thing to forfeit

property that a defendant has sought to smuggle into the United States in violation of customs laws (*One Lot Emerald Cut Stones and One Ring* v. *United States*, 409 U.S. 232 (1972)); in that event, the property *as a whole* is "forbidden merchandise" and its value is "a reasonable form of liquidated damages for violation of the inspection provisions" (*id.* at 237). It is also one thing to forfeit property that is itself harmful to the community (*United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984)); in that event, the forfeiture might, for example, keep "potentially dangerous weapons out of the hands of unlicensed dealers" — which "is a goal plainly more remedial than punitive." But it is quite another thing to forfeit Section 881(a)(7) property — a forfeiture that was intended by Congress to be punitive (*Austin*, 113 S. Ct. at 2811); that bears "'absolutely no correlation to any damages sustained by society or to the cost of enforcing the law'" (*id.* at 2812); that takes property that is, in and of itself, perfectly lawful (*id.* at 2811); and that is "tie[d] * * * directly to the commission of drug offenses" (*ibid.*).

B. For Purposes Of The Double Jeopardy Clause, It Does Not Matter That Respondent Was Subject To Civil Forfeiture Before He Was Subject To Criminal Prosecution, Rather Than Vice Versa

The government offers an alternative way of getting around *Halper* and *Austin*. Even if respondent *was* punished by the forfeiture, it contends (Br. 26-36), the forfeiture does not trigger double jeopardy protections because "a 'punishment' imposed in a civil proceeding" is not "a 'jeopardy' that triggers a protection against a later criminal prosecution" (Br. 30). In the government's view (Br. 32), "a prior criminal prosecution * * * is a prerequisite to the invocation of the Double Jeopardy Clause." Accordingly, because Mr. Ursery suffered the forfeiture first and the prosecution second — rather than the other way around — the government would deny him the protections of the Double Jeopardy Clause.

That makes no sense at all. By its terms, the Double Jeopardy Clause is violated only when a person is "twice put in jeopardy." If, as *Halper* and *Kurth Ranch* held, a civil sanction imposed *after* a criminal sanction can violate the Double Jeopardy Clause, that can only be because the civil proceeding constitutes a second — i.e., a "double" — jeopardy. Accordingly, as Justice Scalia noted in his dissent in *Kurth Ranch*, "if there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference." 114 S. Ct. at 1958. To our knowledge, every circuit to have addressed this issue has reached the same conclusion.[15]

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[15] *See, e.g.*, *United States* v. *Stoller*, No. 95-2175 (1st Cir. Feb. 29, 1996) ("as long as a civil sanction constitutes punishment in the relevant sense, it does not matter if the 'multiple' punishment — presumably a criminal sentence — precedes the attempt to impose the sanction, or conversely, if the sanction precedes the attempt to convict the defendant"); *United States* v. *Sanchez-Escareno*, 950 F.2d 193, 200 (5th Cir. 1991) ("the order of proceedings matters not to the analysis; the *Halper* principle that a civil penalty can be factored into the double jeopardy matrix should apply whether the civil penalty precedes or follows the criminal proceeding"), cert. denied, 506 U.S. 841 (1992); *United States* v. *Mayers*, 897 F.2d 1126, 1127 (11th Cir.) ("the *Halper* principle that civil penalties can sometimes constitute criminal punishment for double jeopardy purposes would seem to apply whether the civil penalties come before or after the criminal indictment"), cert. denied, 498 U.S. 865 (1990); *United States* v. *Morgan*, 51 F.3d 1105 (2d Cir.), cert. denied, 116 S. Ct. 171 (1995); *United States* v. *Williams*, 56 F.3d 63 (4th Cir. 1995); *United States* v. *Tilley*, 18 F.3d 295, 298 n.5 (5th Cir.), cert. denied, 115 S. Ct. 573 (1994); *United States* v. *Austin*, 54 F.3d 394, 399 (7th Cir. 1995); *United States* v. *Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990). But cf. *United States* v. *Newby*, 11 F.3d 1143, 1145 (3d Cir. 1993) (suggesting, without deciding, that a case in which the civil penalty preceded the criminal penalty might be distinguishable from *Halper*).

It would therefore be surprising to discover in *Halper* or *Kurth Ranch* any trace of the government's theory — that there is a "double" jeopardy only when the prosecution comes first. And of course there is no such suggestion in either case. True, the Court stated in *Halper* (490 U.S. at 448-449) "that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." But that was simply a reflection of the fact pattern in *Halper*; the Court certainly was *not* saying that double jeopardy protections apply *only* when the prosecution comes first. After all, if an *initial* civil proceeding cannot pose a *single* jeopardy, how can a *subsequent* civil action ever present a *double* jeopardy?

Nor is it true that "*Halper* turns on the notion that criminal convictions and their resulting sentences, at some point, achieve a degree of finality that is worthy of societal protection." Gov't Br. 31. Instead, the case "turns on" what the Court *said* it turns on (490 U.S. at 448): "Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction serves the goals of punishment."

Kurth Ranch also provides cold comfort to the government's "order is everything" theory. 114 S. Ct. 1937. In that case, the Court invalidated, on double jeopardy grounds, a Montana tax on the possession of illegal drugs that followed upon a criminal penalty for drug offenses. As in *Halper*, the civil sanction happened to follow the criminal penalty; but nowhere did the Court place any weight on that fact. To the contrary, the Court focused on the features of the tax proceeding itself and concluded (*id.* at 1948) that the proceeding was "the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time 'for the same offense.'" If anything, then, *Kurth Ranch* sets forth precisely the proposition the government

denies: that, when the government seeks and obtains a civil sanction, the defendant may be placed in "jeopardy" sufficient to trigger double jeopardy protections.[16]

In short, the government is only half-right when it invokes (Br. 30) "'the fundamental principle that an accused must suffer jeopardy before he can suffer double jeopardy.'" The inevitable complementary proposition is that before the accused "can suffer double jeopardy," he must suffer a *second jeopardy*. *Halper* and *Kurth Ranch* stand for the proposition that, under appropriate if "rare" circumstances (490 U.S. at 449), a civil sanction may give rise to jeopardy. Whether it comes first or second cannot possibly make a constitutional difference.[17]

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[16] Perhaps mindful of this complication, the government rewrites the *Kurth Ranch* decision, suggesting (Br. 34) (emphasis in the original) that the case "may be best understood" as involving "the Double Jeopardy Clause's prohibition on successive *prosecutions*," not the prohibition on multiple *punishments*. But the Court stated at the outset of the opinion what was at stake in *Kurth Ranch* (114 S. Ct. at 1941) (emphasis added; footnote omitted): "This case presents the question whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty for the same conduct may violate *the constitutional prohibition against successive punishments for the same offense*." Moreover, if the case was, in fact, a "multiple prosecutions" case, it is hard to see why Justice Scalia *dissented* in an opinion stating that the Double Jeopardy Clause "prohibits, not multiple punishments, but only multiple prosecutions." 114 S. Ct. at 1955. In any event, if the tax proceeding in *Kurth Ranch* was a second *prosecution*, so too was the criminal proceeding against Mr. Ursery.

[17] This Court's decision in *Witte* v. *United States*, 115 S. Ct. 2199 (1995), does not alter the analysis. In that case, Witte's sentence for marijuana offenses was increased because of his participation in certain cocaine offenses. Thereafter, the government prosecuted Witte for the cocaine offenses as well. This Court held that the Double Jeopardy Clause did not prohibit the second prosecution because "a defendant * * * is punished, for double jeopardy purposes, only for the offense of which the defendant is convicted." *Id.* at 2205. Because Witte had been

C. Respondent Was In Jeopardy Of Being Punished Twice For "The Same Offense"

In every legal and practical sense, Mr. Ursery was punished twice for "the same offense." Each proceeding charged the same crime — manufacturing marijuana. The evidence in each case was virtually identical; the witnesses were the same; the elements of the offenses dovetailed completely. The only difference was in the nature of the two *punishments*: in the first proceeding, respondent lost his property for manufacturing marijuana; in the second, he was sent to jail for manufacturing marijuana. It would be hard to explain, even to a lawyer, how these could possibly be "different" offenses. Particularly in "the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments" (*Halper*, 490 U.S. at 447), it is entirely "well suited" (*ibid.*) to conclude that respondent's forfeiture and conviction were for "the same offense."

As we show below, the same conclusion applies under *Blockburger* v. *United States*, 284 U.S. 299 (1932). Applying the *Blockburger* rule, the court of appeals held (Pet. App. 11a-13a) that the forfeiture of respondent's property and the criminal conviction against him were punishments "for the same offense." The court noted (*id.* at 12a) that 21 U.S.C. 881(a)(7) authorizes the government to forfeit all real property used "'to commit or to facilitate . . . a violation of this subchapter.'" Such "violations" include manufacturing marijuana — the very crime for which Mr. Ursery was

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convicted the first time around only of marijuana charges — and the sentence, while augmented, still fell within the guidelines for marijuana trafficking — the government was free to prosecute in a second case for the cocaine offenses. Nowhere in the case, however, did the Court suggest that *only* a criminal conviction can trigger double jeopardy protections. As we noted above, such a reading of *Witte* could not be squared with *Halper* or *Kurth Ranch*.

convicted. Accordingly, the court reasoned (Pet. App. 12a), "[t]he criminal offense is in essence subsumed by the forfeiture statute and thus does not require an element of proof that is not required by the forfeiture action." In our view, that is exactly right.

1. Under *Blockburger*, the criminal charge against respondent was "a species of lesser-included offense" in the forfeiture action, and may not be separately punished

Under *Blockburger*, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. at 304. By its terms, Section 881(a)(7) requires the government to prove that the property it wishes to forfeit was "used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, *a violation of this subchapter punishable by more than one year's imprisonment.*" 21 U.S.C. 881(a)(7) (emphasis added). The forfeiture provision thus expressly *incorporates* the felony provisions of Title 21 — including 21 U.S.C. 841(a)(1), under which respondent was convicted. The forfeiture provision also requires proof of "a violation" (*i.e.*, all the elements) of the incorporated felony. Proving the elements of the Title 21 felony would invariably prove all but one of the elements of the forfeiture, requiring the government to prove in addition only the "use of the property to facilitate" the felony. Not surprisingly, therefore, a criminal conviction on the underlying felony is routinely given collateral estoppel effect in subsequent forfeiture actions. See, *e.g.*, *United States* v. *"Monkey,"* 725 F.2d 1007, 1010 (5th Cir. 1984); *United States* v. *Certain Real Property & Premises Known as 63-29 Trimble Road, Woodside, New York*, 812 F. Supp. 335, 338 (E.D.N.Y. 1992); *United States* v. *Premises & Real Property at 250 Kreag Road*, 739 F. Supp. 120, 123 (W.D.N.Y.

1990); *United States* v. *Parcel of Land & Buildings Located Thereon at 40 Moon Hill Road, Northbridge, Massachusetts*, 721 F. Supp. 1, 3 (D. Mass. 1988), aff'd, 884 F.2d 41 (1st Cir. 1989). Compare *Halper*, 490 U.S. at 441 & n.4 (finding of "same offense" where defendant was found "liable strictly on the basis of the facts established in the criminal proceeding").

In light of this statutory structure, the underlying narcotics felony is "a species of lesser-included offense" (*Illinois* v. *Vitale*, 447 U.S. at 420) in the forfeiture provision. Of course, the forfeiture itself is not an "offense" at all; it is a punishment for an offense (*Libretti* v. *United States*, 116 S. Ct. 356, 362-363 (1995)). But the offense that it punishes — using property to facilitate a narcotics felony — is a classic "greater offense," in that it incorporates, and predicates the penalty, on the same elements as the incorporated narcotics felony. And under this Court's cases, a defendant who has suffered the penalty for the greater offense (here, the use of property to commit a narcotics felony) cannot thereafter be punished for the lesser-included offense (here, the narcotics felony). For more than 100 years, it has been settled that "a person [who] has been tried and convicted for a crime which has various incidents included in it, * * * cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence." *In re Nielsen*, 131 U.S. 176, 188 (1889). Thus, where a defendant was convicted of a felony-murder arising from a robbery with firearms, he could not thereafter be prosecuted for the lesser-included armed robbery. *Harris* v. *Oklahoma*, 433 U.S. 682 (1977). Conversely, where a defendant was convicted of the lesser-included offense of joyriding, he could not thereafter be prosecuted for the greater offense of auto theft. *Brown* v. *Ohio*, 432 U.S. 161 (1977).

The government's contrary argument (Br. 50-53) is based on a misunderstanding both of the relevant statutes and of this Court's double jeopardy cases. In the government's

view (Br. 51-52), "[c]onviction on the criminal charges" in these consolidated cases "required proof that respondents participated in a conspiracy, possessed a controlled substance with the intent to distribute it, or engaged in unlawful money laundering transactions." But first, the government overlooks the fact that respondent *Ursery's* conviction rested on *none* of these charges; *he* was convicted of *manufacturing* marijuana, the very crime underlying the forfeiture. In *both* proceedings, the underlying "offense" was identical: manufacturing marijuana.

More fundamentally, the government misconstrues this Court's precedents when it contends (Br. 52) that, in "contrast" to the criminal provisions, "the forfeiture statutes do not require proof of any particular crime, or proof of the participation of the property owner in the offenses that supported the forfeiture, much less proof that the owner entertained a mental state required for a criminal conviction." Although Section 881(a)(7) does not *invariably* require such showings, *in the circumstances of this particular case the forfeiture did require the government to prove the same elements as the criminal charge*. And this Court's cases confirm that it is at this "retail" level that the *Blockburger* analysis must proceed.

For example, in *Whalen* v. *United States*, 445 U.S. 684 (1980), the Court held that, under *Blockburger*, a defendant could not be separately punished for rape and for a felony murder based on killing the same victim in the perpetration of the rape. The government argued — as it does here — that the greater offense (there, felony murder) "does not in all cases require proof" of the lesser offense (there, rape); for example, the government noted, the predicate offense could just as easily have been robbery, kidnapping, or arson. *Id.* at 694. The Court rejected that argument. "*In the present case*," the Court explained, "proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from

other cases in which one criminal offense requires proof of every element of another offense." *Ibid.* (emphasis added).

The Court applied the same principle in *Illinois* v. *Vitale*, 447 U.S. 410 (1980). The question in *Vitale* was whether, under the Double Jeopardy Clause, a defendant's conviction for failing to reduce speed to avoid a collision precluded the State from prosecuting him for involuntary manslaughter arising from an automobile accident. The Court analyzed the question by focusing on the State's actual trial theory — not what elements the State *theoretically could* prove at a manslaughter trial, but what elements it *actually would* prove at *this defendant's* trial. As the Court put it (447 U.S. at 420), "it may be that to sustain its manslaughter case [against defendant] the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure. * * * In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* [v. *Ohio*, 432 U.S. 161] and our later decision in *Harris* v. *Oklahoma*, 433 U.S. 682 (1977)." In remanding the case for further proceedings, the Court added (447 U.S. at 421): "if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution."

Here, as in *Harris*, *Whalen*, and *Vitale*, the charge of manufacturing marijuana is "a species of lesser-included offense" (*Vitale*, 447 U.S. at 420) within the greater offense charged in 21 U.S.C. 881(a)(7).[18] To "sustain" (*Vitale*,

[18] See also *United States* v. *Dixon*, 113 S. Ct. 2849, 2856-2858 (1993) (Scalia, J., joined by Kennedy, J.) (where contempt sanction was based on violating the terms of a conditional release, and those terms prohibited violating any criminal law, defendant could not subsequently be prosecuted for violating the drug offense on which the contempt sanction had been based); *Payne* v. *Virginia*, 468 U.S. 1062 (1984) (conviction for robbery was barred under Double Jeopardy Clause where it followed conviction for capital murder committed during the perpetration of an armed robbery).

447 U.S. at 420) its forfeiture in this case, the government proved, by consent judgment, that respondent had manufactured marijuana — one of the predicate offenses explicitly incorporated in 21 U.S.C. 881(a)(7). Having "relie[d] on and prove[d]" that predicate in the first proceeding, the government may not separately punish respondent for the same offense in a subsequent proceeding. Accord *9844 South Titan Court*, 75 F.3d at 1489-1491. Cf. also *United States* v. *Tilley*, 18 F.3d 295, 297-298 (5th Cir.) ("if the prior civil forfeiture proceeding, which was predicated on the same drug trafficking offenses as charged in the indictment, constituted a 'punishment,' the Double Jeopardy Clause will bar the pending criminal trial") (footnote omitted), cert. denied, 115 S. Ct. 573 (1994).

Surely there would be no doubt about that result if the first proceeding had been a *criminal* forfeiture under 21 U.S.C. 853(a)(2), rather than a *civil* forfeiture under 21 U.S.C. 881(a)(7). Presumably even the government would concede that it could not prosecute respondent for the underlying narcotics felony after first proceeding against him in a criminal forfeiture action. But under *Halper* and *Austin*, the Section 881(a)(7) civil forfeiture must be regarded as the functional equivalent of a Section 853(a)(2) criminal forfeiture. And if the Double Jeopardy Clause forbids the government from bringing a prosecution for the underlying offense after a *criminal* forfeiture, it likewise prohibits prosecuting respondent after first forfeiting his property under Section 881(a)(7).

2. The two proceedings cannot be carved up and separately prosecuted based on different "theories" or different time frames

The government contends (Br. 53 n.15 (emphasis in the original)) that the two offenses at issue here are not "the same *in fact*." According to the government (*ibid.*), in the criminal case "[r]espondent Ursery was not charged with, or convicted of, manufacturing marijuana based on any theory that he grew the plants on his property, or that he did so more than once, but rather on the basis that he did so in property belonging to one of his neighbors and on a specific date — July 30, 1992." By contrast, the government insists (*id.* at 54 n.15), "the civil forfeiture action * * * was based on respondent's use of his own property to facilitate the processing and distribution of marijuana over the period of 'several years' that concluded with the search of his residence."

That is neither factually true nor legally relevant. Both proceedings in this case — the forfeiture first, and the prosecution second — were based on exactly the same "theory" (Gov't Br. 53 n.15) and exactly the same evidence. Mr. Ursery most assuredly *was* convicted of manufacturing marijuana "on his property" (*ibid.*). Indeed, the government devoted much of the trial to displaying the physical evidence seized from *respondent's home* (Tr. 32, 36, 38, 40, 42-46, 126, 148, 281). It also proved the presence of marijuana in respondent's backyard (Tr. 138), respondent's use of marijuana on his premises (Tr. 149), and even his processing of marijuana plants in the freezer and microwave oven (Tr. 145). That was the very same "theory" on which the forfeiture was based; there, too, the government alleged that respondent had used his residence to manufacture marijuana. See J.A. 73-79.

Conversely, the forfeiture action — like the criminal prosecution — was *also* based on the "theory" that respondent had used *neighboring property* to grow marijuana. According to the seizure warrant, an informant (Ms. McPherson) had advised police officers that respondent "grows marijuana on his property every year by first starting seedlings indoors, and then transporting them outside to let the plants grow to maturity." J.A. 76. The evidence ultimately revealed (see, *e.g.*, Pet. App. 2a; Tr. 11) that the "property" on which respondent was growing marijuana was between 25 and 150 feet outside his property line. In short, the "theory" in *both* proceedings — both the forfeiture and the prosecution — was that respondent had grown marijuana *off* his premises and processed it *on* the premises.

More critically, the government's "different theory" distinction is legally beside the point. A single, discrete offense cannot be carved up into separately prosecutable legal "theories." This Court's decision in *Sanabria* v. *United States*, 437 U.S. 54 (1978), makes precisely that point. There, the trial court had entered a mid-trial judgment of acquittal on the ground that there was insufficient proof that the defendant had participated in a gambling business. The government acknowledged that it could not retry the defendant on the particular theory that the trial court had found wanting — specifically, that defendant had participated in a horse-betting scheme. The government insisted, however, that it could proceed on a *different* theory — that the defendant had participated in numbers betting. This Court rejected that contention. There was only *one* offense charged, the Court held (*id.* at 71-72): participation in gambling. And that single charge could not be carved up, and retried, based on a new theory. As the Court put it (*id.* at 72): "'The Double Jeopardy Clause is not such a fragile guarantee that . . . its limitations [can be avoided] by the simple expedient of dividing a single crime into a series of temporal or spatial units,' *Brown* v. *Ohio*, 432 U.S., at 169, or as we hold today, into 'discrete bases of liability' not defined as such by the legislature."

There is likewise no substance to the government's contention (Br. 53 n.15) that the prosecution focused "on a specific date — July 30, 1992," while the forfeiture was based on marijuana manufacturing "over the period of 'several years.'" Although the indictment charged respondent with manufacturing "on or about July 30, 1992," the government offered abundant evidence of conduct from earlier years. See, *e.g.*, Tr. 138, 179. And as a matter of law, the government was not required to prove an offense "on a specific date"; it only had to prove the offense "on or about" that date, and the jury was accordingly instructed to determine whether "the offense was committed on dates reasonably near the dates set forth in the Indictment." Tr. 354. See, *e.g.*, *United States* v. *Harrison-Philpot*, 978 F.2d 1520, 1526 (9th Cir. 1992), cert. denied, 508 U.S. 929 (1993). Moreover, the forfeiture action focused on a continuous course of conduct, and "[e]very minute" that respondent manufactured marijuana "he was simultaneously committing both the lesser included [felony] and the greater" offense (the use of property to commit a narcotics felony). *Garrett* v. *United States*, 471 U.S. 773, 789 (1985). In any event, it does not matter, for double jeopardy purposes, that the forfeiture action involved a course of conduct over "several years," while the criminal prosecution involved only a single date, plucked from within that period. To restate what the Court said in *Brown* and *Sanabria*: "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."

D. Respondent Was In Jeopardy Of Being Punished Twice In "Separate Proceedings"

We agree with the government (Br. 54-59) that the Double Jeopardy Clause does not prohibit statutorily authorized multiple punishments that are imposed in the "same proceeding." See *Kurth Ranch*, 114 S. Ct. at 1945; *Halper*, 490 U.S. at 450. The court of appeals was correct, however, in

concluding (Pet. App. 13a-17a) that the forfeiture and prosecution in this case were separate proceedings.

As a general rule, two proceedings are "separate" for purposes of double jeopardy when they bear the formal characteristics of separateness: different trials, different timing, different docket numbers, and different judges. These are the defining features of a "proceeding" in our legal system. Under that framework, respondent's forfeiture and prosecution were clearly separate.

If formalities are not enough, however, separateness should be analyzed in terms of the underlying purpose of the Double Jeopardy Clause — to protect defendants from the harassment of multiple actions. For several reasons, that purpose is best served by treating the two actions in this case as separate proceedings.

1. A "proceeding" in our legal system has certain defining characteristics, tied principally to a particular tribunal. *Black's Law Dictionary*, for example, defines a "proceeding" as "the form and manner of conducting juridical business before *a court or judicial officer*." *Black's Law Dictionary* 1083 (5th ed. 1979) (emphasis added). Similarly, "legal proceedings" are defined as "all proceedings authorized or sanctioned by law, and brought or instituted *in a court or legal tribunal*, for the acquiring of a right or the enforcement of a remedy." *Id.* at 807 (emphasis added). Proceedings have a "[r]egular and orderly progress" (*id.* at 1083), flowing from the initiation of the lawsuit, the assignment of a particular docket number and judge, the setting of a trial date, through and including the prospect of post-trial litigation.

In our view, the meaning of "separate proceedings" should hinge, first and last, on these formal criteria. That approach best accords with how "proceeding" is understood in common legal parlance. It also accords best with this Court's cases. Indeed, this Court has invariably defined

"same proceeding" in such plain, common-sense terms. Thus, for example, in *Kurth Ranch* the Court used the terms "separate legal proceedings" (114 S. Ct. at 1942) to differentiate a series of actions that had overlapping starting dates but different venues and purposes: prosecution, forfeiture, and dangerous drug tax collection actions. Elsewhere, the Court has defined a single proceeding as one in which "no more than one trial * * * was ever contemplated" (*Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984)) or as one in which the "trial [is] completed by a particular tribunal" (*United States* v. *DiFrancesco*, 449 U.S. 117, 128 (1980) (internal quotation marks omitted)). And in *Halper* the Court equated a "single proceeding" with a "'single trial.'" 490 U.S. at 450-451 (quoting *Missouri* v. *Hunter*, 459 U.S. 359, 368-369 (1983)).

This formal, common-sense definition of "separate proceeding" also has the virtue of certainty and predictability. Unlike the government's test — which turns on such vagaries as "the defendant's legitimate expectation of finality" (Br. 57) and a prosecutor's "inten[t] to seek a full complement of statutorily authorized remedies" (Br. 57) — our approach does not require courts to assess the "expectations" or "intentions" of the parties. Instead, a court need only ask whether the two actions at issue bear all the usual hallmarks of "separateness," as that concept is conventionally understood in our legal system.

Applying these criteria, the two actions against Mr. Ursery were unmistakably separate. Two distinct tribunals considered the punishment imposed on Mr. Ursery, at two separate times, and (had the forfeiture case not settled) would incontestably have done so at two separate trials. Moreover, as the court of appeals noted (Pet. App. 16a), the actions "were instituted four months apart, presided over by different judges and resolved by separate judgments." Proceedings that involve different adjudications before different tribunals at different times — and that have been pursued despite

absolutely "no communication between the government attorneys" handling each proceeding (see *ibid.*) — can no more be artificially aggregated in order to pass muster under the Double Jeopardy Clause than "infinitely subdivided" in order to support a defendant's claim. *Ohio* v. *Johnson*, 467 U.S. at 501.

The government has a different idea. It would replace these common-sense formalities with a rule that allows several "parallel" proceedings so long as they are "basically contemporaneous" (Br. 57) — a concept that apparently is pliable enough to embrace a delay of four months. That notion cannot stand before precedent or common sense. The "separate legal proceedings" that this Court identified in *Kurth Ranch* (114 S. Ct. at 1942) also were "basically contemporaneous"[19] — indeed, more nearly simultaneous than the criminal prosecution and the forfeiture that the government pursued against Mr. Ursery — but that did not make them less "separate." See *United States* v. *Torres*, 28 F.3d 1463, 1465 (7th Cir. 1994) ("In *Kurth Ranch* itself the tax proceeding was begun at the same time as the criminal prosecution; the Supreme Court did not think the fact that the two were pending contemporaneously mattered"). Likewise, the temporal overlap between the proceedings in this case did not make two into one. Accord *9844 South Titan Court*, 75

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[19] Criminal charges against the Kurths were filed on October 23, 1987 (see Pet. Br. 4 (No. 93-144)), and judgment was entered pursuant to a plea agreement on July 18, 1988 (see 114 S. Ct. at 1942). The civil forfeiture claim was filed on December 3, 1987, and judgment was entered on October 28, 1988. See *In re Kurth Ranch*, 122 B.R. 759, 760 (Bankr. D. Mont. 1991). The dangerous drug tax (which was adjudicated as part of a bankruptcy proceeding) was assessed on December 12, 1987. See *In re Kurth Ranch*, 145 B.R. 61, 63 (Bankr. D. Mont. 1990).

F.3d at 1488 ("'two trials, even if close in time, are still double jeopardy'"); *Torres*, 28 F.3d at 1465 (same).[20]

In short, the forfeiture and prosecution against Mr. Ursery were plainly separate in every conventional sense. This Court need go no further in rejecting the government's contrary claim.

2. If formalities are not sufficient, however, the meaning of "separate proceedings" should be grounded in the purposes of double jeopardy protection. At bottom, the Double Jeopardy Clause "guards against Government oppression" (*United States* v. *Scott*, 437 U.S. 82, 99 (1978)) through an "intrinsically personal" protection (*Halper*, 490 U.S. at 447). The Clause protects against the strain, expense, and harassment of multiple proceedings that purport to punish a defendant for the same offense. See, *e.g.*, *Abney* v. *United States*, 431 U.S. 651, 661 (1977) (Double Jeopardy Clause guarantees individuals that they will not be "forced * * * to endure the personal strain, public embarrassment, and expense" of multiple proceedings); *United States* v. *Scott*, 437 U.S. 82, 87 (1978) (protection also against "ordeal" and "continuing state of anxiety and insecurity") (quoting *Green*

[20] The government attempts (Br. 58-59) to counteract the intuitively obvious separateness of the proceedings at issue by chastising Mr. Ursery for failing to move for dismissal on double jeopardy grounds until he had been convicted. It is not clear what difference this fact makes for purposes of whether the two actions were "separate proceedings." The government's position is particularly surprising in light of its previous, repeated contentions in the lower federal courts that a "multiple punishments" challenge may be brought *only* after the second punishment has been imposed. The government has advanced that theory in urging courts of appeals — usually without success — to dismiss interlocutory appeals from double jeopardy rulings that were entered before the second punishment was imposed. See, *e.g.*, *United States* v. *Perez*, 70 F.3d 345, 346-347 (5th Cir. 1995) (rejecting argument); *United States* v. *Baird*, 63 F.3d 1213, 1215 n.4 (3d Cir. 1995) (same); *United States* v. *Chick*, 61 F.3d 682, 684-685 (9th Cir. 1995) (same).

v. *United States*, 355 U.S. 184, 187-188 (1957)); see also *United States* v. *Dinitz*, 424 U.S. 600, 608 (1976) (protection against "delay"). The core principle is that a defendant should not be forced to "'run the gauntlet' a second time" to answer for the same offense, *Abney*, 431 U.S. at 662, and should not have to gather and deploy the resources and energies necessary for his defense more than once for each crime with which he is accused.

Under that view of the purposes of the Double Jeopardy Clause, the proceedings in this case were undeniably "separate." First, the two actions were *instituted* four months apart; and successive filings are themselves harassing, even if the cases ultimately overlap in part. "The practice of *instituting* multiple proceedings against a single defendant, which the government benignly terms a 'coordinated law-enforcement effort,' has as much or more capacity to harass and exhaust the defendant than does a post hoc decision to retry him." *9844 South Titan Court*, 75 F.3d at 1488 (emphasis added).

Second, the government gained a palpable tactical advantage from the separation. The criminal prosecution against Mr. Ursery was not initiated until the parties in the forfeiture case had conducted discovery and even exchanged witness lists for trial. By that point, the government had obtained invaluable insights into the defense case, enabling it "to hone its presentation of its [own] case" in the subsequent prosecution. *Ohio* v. *Johnson*, 467 U.S. at 501. And significantly, discovery of the defendant's witnesses, and consequent trial strategy, is a right the government did *not* have in the prosecution itself. Compare Fed. R. Civ. P. 26(a)(3) (requiring disclosure of all witnesses expected to testify at trial) with Fed. R. Crim. P. 16(b)(1)(c) (requiring disclosure only of defendant's *expert* witnesses, and only if the defendant has requested and received similar disclosure from the government). By timing the prosecution as it did, the government effectively circumvented the restrictions on

federal criminal discovery rules, "gain[ing] an advantage from what it learn[ed] * * * about the strengths of the defense case and the weaknesses of its own." *DiFrancesco*, 449 U.S. at 128.

Finally, unlike the cases cited by the Solicitor General (Br. 56 n.16), it cannot be said that "respondent's efforts were directed to separate disposition" of the two actions. *Ohio* v. *Johnson*, 467 U.S. at 502. Unlike the defendants in *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294 (1984), and *Jeffers* v. *United States*, 432 U.S. 137 (1977), Mr. Ursery was not "responsible for insisting that there be separate rather than consolidated trials." *Ohio* v. *Johnson*, 467 U.S. at 502. To the contrary, it was entirely the government's choice to bring criminal charges against Mr. Ursery four months after commencing the forfeiture proceeding. Far from attempting, as it did in *Jeffers*, to join all proceedings in a single trial, the government — which alone controlled the initiation of the proceedings — imposed multiple proceedings, and multiple punishments, upon Mr. Ursery.

3. The government's contrary view rests on a crabbed understanding of the purposes of double jeopardy protection. The Double Jeopardy Clause is not designed to safeguard merely "the defendant's legitimate expectation of finality" (Br. 57); it also protects against the "prevention of prosecutorial overreaching" (*Ohio* v. *Johnson*, 467 U.S. at 501). The government cannot defend "piling on" additional proceedings merely by claiming that the outcome of the first proceeding has not yet been determined.

Indeed, if the government's argument were correct, there would hardly be much to double jeopardy at all: the government could defeat any such "legitimate expectation" simply by announcing, before the close of the first proceeding, that it intended to launch a new action. It would not matter that the defendant had litigated the first proceeding through

discovery; it would not matter that the parties were poised to begin trial in the first proceeding. And it would not even matter that *both* proceedings were criminal prosecutions charging identical offenses. So long as the government can still assert "here we go again," all would be the "same" proceeding, and any double jeopardy claim would swiftly go by the boards. Yet that is precisely the sort of "governmental overreaching that double jeopardy is supposed to prevent." *Ohio* v. *Johnson*, 467 U.S. at 502.

Nor should it matter that the government may not, in fact, have been "dissatisfied" with the results in the forfeiture case at the time it commenced the criminal action. Gov't Br. 58. In the first place, it is by no means clear why the Court should credit that factual assertion; there is no basis in the record for gauging the government's state of mind at the time of the indictment. Indeed, for all we know, the government — having litigated the forfeiture to the brink of trial — was dissatisfied with the likely outcome and indicted the case to up the ante. In any event, "the government's good faith does not make two proceedings a single jeopardy." *9844 South Titan Court*, 75 F.3d at 1488.[21]

Finally, there is no merit to the government's suggestion (Br. 56 n.17) that the two actions in this case must be a single proceeding because "Congress quite clearly intended" the two punishments "to be available." For one thing, the issue is a strawman at best: there is in fact no impediment to bringing the type of forfeiture at issue in *this* case in a consolidated criminal proceeding. And other forfeiture provisions — which the government claims it cannot consolidate with criminal actions (but see page 22 n.10 (*supra*)) —

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[21] Moreover, even if, as the district court concluded (Pet. App. 39a), the two proceedings in this case were "coordinated," that cannot alleviate double jeopardy concerns. To the contrary, *coordinating* the proceedings is likely to exacerbate the harassment entailed by exposing a defendant to multiple punishments. See *9844 South Titan Court*, 75 F.3d at 1488.

may not be sufficiently punitive to trigger double jeopardy protections in the first place.

In any event, the Double Jeopardy Clause, like other provisions of the Bill of Rights, is a limitation on the means by which congressional intent may be carried out. As the Court has observed, "where the Double Jeopardy Clause is applicable, its sweep is absolute * * * , for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." *Burks* v. *United States*, 437 U.S. 1, 11 n.6 (1978). More than some other provisions, the Double Jeopardy Clause "require[s] the Government to turn square corners." *Jones* v. *Thomas*, 491 U.S. 376, 396 (1989) (Scalia, J., dissenting). It would seem simple enough to bring a criminal case and a civil case before the same judge and jury as part of the same proceeding, much as in many states a criminal trial in a capital offense is followed by a sentencing "trial" before the same jury. Yet if, as the Solicitor General contends (Br. 56 n.17), the Double Jeopardy Clause may, "[a]s a practical matter," make it impossible to punish a defendant with both a criminal sentence and a civil forfeiture, any needed procedural adjustment is a matter well within the power and the competence of Congress. Unless and until Congress acts, the Double Jeopardy Clause does not permit the government to pretend that two proceedings are really only one.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

LAWRENCE J. EMERY
3401 East Saginaw, Suite 104
Lansing, Michigan 48912
(517) 337-4866

LAWRENCE S. ROBBINS
Counsel of Record
DONALD M. FALK
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Respondent Guy Jerome Ursery

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